SUBORDINATE LEGISLATION COMMITTEE

AGENDA

17th Meeting, 2004 (Session 2)

Monday 17th May, 2004

The Committee will meet at 2.30pm in Committee Room 3, Committee Chambers, Edinburgh.

1. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in the following Bill—

   the School Education (Ministerial Powers and Independent Schools) (Scotland) Bill at Stage 1.

2. **Executive responses:** The Committee will consider the responses from the Scottish Executive to points raised on the following—

   the Feeding Stuffs (Scotland) Amendment Regulations 2004, (SSI 2004/208).

3. **Instruments subject to annulment:** The Committee will consider the following—

   the Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures) (Scotland) Order 2004 (SSI 2004/209)

   the Food (Emergency Control) (Scotland) (Miscellaneous Amendments) Regulations 2004 (SSI 2004/210)

   the Tobacco Advertising and Promotion (Specialist Tobacconists) (Scotland) Regulations 2004 (SSI 2004/211)

   the Primary Medical Services (Consequential and Ancillary Amendments) (Scotland) Order 2004 (SSI 2004/212).

Alasdair Rankin
Clerk to the Committee
Tel: 0131 348 5212
The following papers are attached for this meeting:

Agenda Items 1-3

Legal Brief (for members only) SL/S2/04/17/1

Agenda Item 1

Executive Memorandum on Subordinate Legislation Powers (plus Bill and Accompanying Documents) SL/S2/04/17/2

Agenda Item 2

Executive Responses SL/S2/04/17/3

Agenda Item 3

Copies of instruments (circulated to Committee members only)

Papers circulated for information:

Minutes of 16th meeting, 2004 SL/S2/04/16/M
MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

SCHOOL EDUCATION (MINISTERIAL POWERS AND INDEPENDENT SCHOOLS) (SCOTLAND) BILL

Purpose

1. This Memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the School Education (Ministerial Powers and Independent Schools) (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose and nature of each such provision and explains why the matter is to be left to subordinate legislation. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill (documents SP Bill 22-EN and SP Bill 22-PM, respectively).

Policy Context

2. The objective of Part 1 of the School Education (Ministerial Powers and Independent Schools) (Scotland) Bill is to give the Scottish Ministers proportionate powers that will assist them to meet their statutory duty to endeavour to secure improvement in the quality of school education which is provided for Scotland. This statutory duty on the Scottish Ministers is set out in section 3(1) of the Standards in Scotland’s Schools etc. Act 2000 (the “2000 Act”).

3. Part 1 of the Bill, therefore, introduces new ministerial powers to direct action by education authorities and by grant-aided schools if sufficient steps have not been taken to secure improvement following Her Majesty’s Inspectorate of Education (HMIE) inspections. There is no subordinate legislation arising from this part of the Bill.

4. The duty on the Scottish Ministers to secure improvement covers all school education, and Part 2 of the Bill amends the existing legislative provisions for independent schools. The statutory provisions for independent schools are contained in Part V of the Education (Scotland) Act 1980 Act (the “1980 Act”). They cover the process of registration and procedures for addressing concerns about these schools. The objective of Part 2 of the Bill is to update these provisions to ensure that they apply consistently across the independent school sector and that appropriate, timely and proportionate action can be taken by Ministers to address concerns.

5. The provisions of the Bill all amend existing legislation relating to the provision of education. As such, they make amendments of the 1980 Act and the 2000 Act. This reflects the objective of the Bill to build on the existing systems in place to deliver improvement.
OUTLINE AND SCOPE OF THE BILL

6. **Part 1** provides the Scottish Ministers with new powers to direct education authorities and the managers of grant-aided schools to take specific actions to secure improvements following inspections by HMIE. The new provisions are inserted into the 1980 Act and the 2000 Act.

7. **Part 2** contains amendments of the provisions governing independent schools in Part V of the 1980 Act, and amends the definition of an independent school under section 135 of that Act.

8. **Part 3** provides for the short title, commencement, minor amendments and repeals and transitional provisions.

SUBORDINATE LEGISLATIVE POWERS – OUTLINE

9. Part 2 of the Bill gives the Scottish Ministers power to make subordinate legislation as follows:

   - regulations to stipulate what information registered schools must provide for the Registrar and in what form (Schedule 1 amendment to section 98(3)(a) of the 1980 Act);
   - regulations on the form an application for registration of an independent school will take and what information it will contain (section 4(2) inserting section 98A(2) into the 1980 Act);
   - regulations to define "prescribed person". The consequence of a person falling within a class of persons defined as “prescribed persons” being that the Scottish Ministers would consider them not proper to be either a proprietor of an independent school or a teacher (section 4(2) inserting section 98A(6) into the 1980 Act); and
   - commencement orders including transitional and savings provisions (section 9(2) and section 9(3)).

10. The powers to make subordinate legislation in the Bill are all conferred on the Scottish Ministers. The Section 9 powers to bring the Bill into force and make transitional provision are the only ones that will not be inserted into the 1980 Act. Of the other powers, the powers to define a "prescribed person" in section 4(2) are new while the rest replace or amend existing powers.

11. The intention behind taking subordinate legislation powers is to ensure flexibility to respond to changing circumstances and new developments in the independent education sector without the necessity for further primary legislation. The powers are intended to be used for operational matters relating to the registration and regulation regime.
12. The Bill also gives the Scottish Ministers the power to give directions to the Registrar of Independent Schools (“the Registrar”) as to the details in respect of registered schools which are to be kept in the Register (section 4(1) inserting section 98(2)(a), (b) and (d) into the 1980 Act).

**SUBORDINATE LEGISLATIVE POWERS – DETAIL**

**Form of, and information to be provided to the Registrar by registered schools**

*Section 98(3)(a): Power to prescribe by regulations what information registered schools must provide to the Registrar of Independent Schools and in what form.*

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution of the Scottish Parliament (by virtue of section 137 of the 1980 Act)

Schedule 1 outlines the amendment of the existing power to prescribe by regulations what information independent schools must provide to the Registrar in section 98(3)(a) of the 1980 Act. The amendment substitutes the word “registered” for “independent”. This allows the Scottish Ministers to continue to make regulations outlining what information schools already operating as registered independent schools require to provide to the Registrar and in what form. The amendment is consequential on the removal of provisional registration by the Bill. All independent schools will now require to be registered in order to operate.

The intention is to require certain information from registered schools on an annual basis and to specify what changes must be notified to the Registrar in between annual returns. The information which proprietors currently require to provide to the Registrar includes information on pupil numbers, proprietors and premises. The intention would be to extend the information required to include, for example, information confirming that relevant Disclosure Scotland checks have been carried out on staff and confirmation that necessary health and safety assessments have been undertaken.

Regulations have been chosen as providing the flexibility to take account of varying circumstances which may arise. Regulations can be amended where necessary to accommodate changing educational or other legislative frameworks and developments in the practical application of the system. In particular, this will ensure that relevant and necessary information can be obtained to allow Ministers to continue to be satisfied that the premises and accommodation are suitable, that the teachers and proprietors are proper persons, and that the children’s educational and welfare needs are adequately met.

**Form of, and information to be contained in, applications to become independent schools**
**Section 4(2): Power to prescribe by regulations the form an application for registration of an independent school will take and what information it will contain.**

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution of the Scottish Parliament (by virtue of section 137 of the 1980 Act)

Section 4(2) inserts a new section 98A into the 1980 Act. Section 98A outlines the application procedure to be followed when applying to be registered as an independent school, and subsection (2) of that section provides a power to make regulations. This is not a new power. It reflects the power currently found in section 98(1)(a) of the 1980 Act, which allows regulations to prescribe the particulars to be included in any application for registration. The power in new section 98A(2) allows Scottish Ministers to specify in regulations the information that should be included in an application by prospective independent schools and in what form it will be given.

The regulations made under the existing provisions date back to 1957 and need to be updated. The information which those regulations require to be provided includes information on pupils, teachers, proprietors, premises and type of education provided. Over the years, the Registrar has requested additional information, for example on the curriculum and disclosure checks. It is intended that new regulations will reflect the need for additional information that will be required to allow Ministers to make an informed decision about registration.

The intention is that necessary information on prospective schools can be sought from applicants to ensure that The Scottish Ministers have sufficient information available to enable them to decide whether to grant an application for registration.

Regulations have been chosen to allow flexibility to enable the regulations to be quickly adapted and extended to take account of developments in education and the relevant legislative frameworks.

**Definition of a “prescribed person”**

**Section 4(2): Power to prescribe by regulations the class of person that will be defined as a “prescribed person”, so that a person falling within that class of person would not be considered by Scottish Ministers to be a proper person to be the proprietor of an independent school or a teacher.**

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution of the Scottish Parliament (by virtue of section 137 of the 1980 Act)
Section 4(2) inserts a new section 98A into the 1980 Act. This section relates to the application procedure to be followed when applying to be registered as an independent school. As part of that procedure, the Scottish Ministers must be satisfied that the proprietor and any proposed teacher are proper persons. Subsection (5)(a) of this section specifies circumstances in which the person will not be considered “proper”. Two of the circumstances relate to earlier disqualifications, either under the 1980 Act or under the Protection of Children (Scotland) Act 2003, and the third is if they fall into a new category of a “prescribed person”. Subsection (6) provides the Scottish Ministers with the power to prescribe in regulations a class of person as being a “prescribed person”.

This is a new power and will allow the Scottish Ministers to extend the description of those persons who are not considered to be suitable to be a proprietor of an independent school or to be a teacher. While there is no immediate intention to use this power it will allow Ministers to respond to any future developments relating to the operation of independent schools or child protection in this area. The circumstances envisaged where this power may be used, would be where it was identified that a particular group of people would not be considered appropriate to work with children, or if a decision was made to define the qualifications required of teachers in this sector or it was agreed that all teachers at independent schools required to be registered with the General Teaching Council.

Commencement, transitional provisions

Section 9: Power to make an order appointing the day or days on which the provisions will come into force, and any transitional provisions or savings.

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution of the Scottish Parliament

Section 9(2) provides for the Scottish Ministers by order to specify the day or days when the provisions of the Bill shall come into force. It allows different days to be specified for different purposes. Section 9(3) provides for such an order to make such transitional or savings provisions as they think necessary.

This is a standard commencement provision to enable effective commencement of the Bill. It is not intended at this stage to have a phased implementation of the Bill, although for practical reasons this may be required. It is intended that the power will, for example, be used to detail the transitional arrangements required for independent schools already provisionally registered under the current system and for existing establishments affected as a result of the removal of the five pupil threshold in the definition of an independent school.

Information to be recorded by the Registrar in the Register
Section 4(1): Directions by Scottish Ministers to the Registrar as to the information on registered schools to be recorded in the Register of Independent Schools.

Power conferred on: The Scottish Ministers

Power exercisable by: Directions

Parliamentary Procedure: None

Section 4(1) substitutes subsection (2) of section 98 of the 1980 Act with new subsections (20 and (2A). New subsection (2) details the information which the Registrar is to record in the Register as directed by the Scottish Ministers. This includes in terms of subsection (2)(a), information taken from the application for registration; in terms of paragraph (b), information relating to any conditions which have been imposed in respect of the operation of the school, including details on any variation or revocation and in terms of paragraph (d), information which requires to be notified to the Registrar by proprietors including information on changes in particulars.

The power to give directions to the Registrar could have been expressed as a power to specify by regulations what is to be recorded in the Register. However, the existing power in section 98 of the 1980 Act is a power to give directions and that is considered to provide an appropriate degree of flexibility over time, to enable account to be taken of developments in the practical administration of the system. This overall approach has been chosen to allow us to meet the new Freedom of Information requirements without jeopardising Data Protection principles.
Executive Responses

- the Feeding Stuffs (Scotland) Amendment Regulations 2004, (SSI 2004/208)
In its letter of 11th May to Catherine Hodgson, the Committee requested an explanation of the following matters –

“1. The Committee asks the Executive why it has not included in the preamble a reference to the consultation requirements contained in Article 9 of Regulation (EC) 178/2002. The Committee notes that section 84(1) of the parent Act is cited, and that citation of section 84(1) encompasses the requirements of Article 9. However, as the Regulations appear to be made partly under section 2(2) of the ECA to which section 84 has no relevance, the Committee asks the Executive for an explanation.

2. The Committee asks the Executive what if any plans there are for consolidation given the substantial amendments that have been made to the principal Regulations.”

The Food Standards Agency responds as follows –

1. The Agency does not consider that it is necessary to refer in the preamble to the consultation requirement contained in Article 9 of Regulation (EC) No. 178/2002 of the European Parliament and of the Council given that this is not a statutory precondition. The Agency confirms that the consultation requirements contained both in the Regulation and in the Agriculture Act 1970 have been fulfilled.

2. The Agency is aware of the Committee’s view that consolidation should take place at or around the fifth occasion on which regulations are amended. The Committee will recall the Agency’s letter of 9th October 2003 concerning the previous amendment to the Feeding Stuffs (Scotland) Regulations and which anticipated the amendments effected by these Regulations. The Agency is aware that further modest amendments to the Feeding Stuffs (Scotland) Regulations will be required during 2004 and so did not consider it appropriate to consolidate the principal regulations at this point. Nevertheless the Agency remains alive to the Committee’s views on consolidation and may consider consolidation once the current tranche of amendments is complete.

Food Standards Agency